

**CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT**

NOTICE OF PROPOSED RULEMAKING

TITLE 22, CALIFORNIA CODE OF REGULATIONS

**AMENDMENTS TO SECTION 12901 METHODS OF DETECTION
SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986**

NOTICE IS HEREBY GIVEN that the Office of Environmental Health Hazard Assessment (OEHHA) proposes to amend Title 22, California Code of Regulations, Section 12901.

PUBLIC PROCEEDINGS

A public hearing will be held on **Tuesday, July 20, 2004**, at which time any person may present statements or arguments orally or in writing relevant to the action described in this notice. The public hearing will commence at 10:00 a.m. in the Coastal Hearing Room, California Environmental Protection Agency Building, 1001 I Street, 2nd Floor, Sacramento, California and will last until all business has been conducted, or until 5:00 p.m.

Any written statements or arguments regardless of the form or method of transmission must be received by OEHHA by 5:00 p.m. on **Tuesday, July 20, 2004**, which is hereby designated as the close of the written comment period.

Written comments regarding this proposed action may be sent by mail or by facsimile addressed to:

Cynthia Oshita
Office of Environmental Health Hazard Assessment
Proposition 65 Implementation Program
P. O. Box 4010
Sacramento, California 95812-4010
FAX: (916) 323-8803
Telephone: (916) 445-6900

Comments sent by courier should be delivered to:

Cynthia Oshita
Office of Environmental Health Hazard Assessment
1001 I Street, 19th Floor
Sacramento, California 95814

Comments may also be transmitted via email addressed to: (coshita@oehha.ca.gov).

It is requested, but not required, that written statements or arguments be submitted in triplicate.

If you have special accommodation or language needs, please contact Cynthia Oshita at (916) 445-6900 or coshita@oehha.ca.gov by July 6, 2004. TTY/TDD/Speech-to-Speech users may dial 7-1-1 for the California Relay Service.

CONTACT

Inquiries concerning the substance and processing of the action described in this notice may be directed to Cynthia Oshita, in writing at the address given above, or by telephone at (916) 445-6900. Ms. Susan Luong is a back-up contact person for inquiries concerning processing of this action and is available at the same telephone number.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as Proposition 65 (hereinafter referred to as “Proposition 65” or “the Act”), was enacted as a voters’ initiative on November 4, 1986 and codified at Health and Safety Code Section 25249.5 et seq. The Office of Environmental Health Hazard Assessment (OEHHA), within the California Environmental Protection Agency is the state entity responsible for the implementation of the Act. OEHHA has the authority to promulgate and amend regulations to further the purposes of the Act. Included among the provisions of Proposition 65 is a prohibition against contaminating sources of drinking water with chemicals known to the state to cause cancer or reproductive harm and a requirement that businesses provide warnings before exposing individuals to chemicals known to the state to cause cancer or reproductive harm. Health and Safety Code Section 25249.11, subsection (c) defines “significant amount” of a listed chemical to mean “any detectable amount,” other than an amount which poses no significant risk for carcinogens, or would have no observable effect assuming exposure at one thousand times the level in question with regard to chemicals known to cause reproductive harm. The Act, however, does not specify what analytical test methods must be used to determine whether a discharge, release, or exposure contains a detectable amount of a chemical listed under the Act.

Section 12901 was adopted to clarify and make more specific what is meant by “any detectable amount.” The current version of the regulation adopted in 1989 provides that, where specified state or local governmental agencies have adopted or employed a method of analysis, that method must be used for purposes of the Act. Where these specified state or local government agencies have not adopted a method of analysis, but where a federal governmental agency has, the federally adopted method must be used. Where no governmental (local, state, or federal) agency has adopted a method of analysis, a method of analysis that is generally accepted in the scientific community must be used. Where no such method is available, a scientifically valid method must be used. Where more than one method of analysis had been adopted in a given tier, then any method within the tier could be used. The structure of the current regulation, therefore, created a tiered hierarchy of acceptable methods of analysis. The existing regulation also provides that generally accepted

standards and practices for sampling, analyzing, and interpreting the data must be observed when using a particular method of analysis and that no discharge, release or exposure occurs under the Act, unless a listed chemical is detectable as provided in the regulation.

In recent years, litigants and courts have had difficulty interpreting and applying Cal. Code of Regs., Section 12901, particularly in the context of consumer products exposures. Recent cases such as *Mateel Environmental Justice Foundation v Edmund Gray et al.* (2004) 9 Cal.Rptr.3d 486; 4 Cal. Daily Op. Serv. 569; 2004 Daily Journal D.A.R. 717 and various trial court decisions have highlighted issues with the application of the regulation to particular types of exposures as well as the difficulties some litigants encounter in identifying the proper method of analysis for a given chemical in a particular medium. Therefore, OEHHA has determined that amendments to the regulation are necessary to provide a level of certainty for persons subject to the provisions of the Act. OEHHA staff have informally solicited input from representatives of the plaintiff and defense bar, the Office of the Attorney General and various members of the public, staff has reviewed decisions and pleadings from various cases decided and pending that address the application of this regulation and have developed proposed amendments to the regulation for public comment and discussion. OEHHA will also consider alternatives to the proposed amendments that may include potentially repealing some or all of the section.

In summary, the proposed amendments would remove the current hierarchy among the various acceptable methods of detection, would add a definition for the word “medium” as used in the regulation, and would make various other technical changes to the regulations in an attempt to add clarity and flexibility in the application of the regulation to various types of exposure scenarios.

AUTHORITY

Health and Safety Code Section 25249.12.

REFERENCE

Health and Safety Code Sections 25249.5, 25249.6, 25249.7, 25249.9, 25249.10 and 25249.11.

IMPACT ON LOCAL AGENCIES OR SCHOOL DISTRICTS

OEHHA has determined the proposed regulatory action would not impose a mandate on local agencies or school districts; nor does it require reimbursement by the State pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code. OEHHA has also determined that no nondiscretionary costs or savings to local agencies or school districts will result from the proposed regulatory action.

COSTS OR SAVINGS TO STATE AGENCIES

OEHHA has determined that no savings or increased costs to any State agency will result from the proposed regulatory action.

EFFECT ON FEDERAL FUNDING TO THE STATE

OEHHA has determined that no costs or savings in federal funding to the State will result from the proposed regulatory action.

EFFECT ON HOUSING COSTS

OEHHA has determined that the proposed regulatory action will have no effect on housing costs.

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS, INCLUDING ABILITY TO COMPETE

OEHHA has made an initial determination that the adoption of the regulation will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. OEHHA believes the proposed amendments to the regulation could provide clarity and certainty for businesses that must comply with Proposition 65.

IMPACT ON THE CREATION, ELIMINATION, OR EXPANSION OF JOBS/BUSINESSES

OEHHA has determined that the proposed regulatory action will not have any impact on the creation or elimination of jobs, the creation of new businesses or the elimination of existing businesses, or the expansion of businesses currently doing business within the State of California.

COST IMPACTS ON REPRESENTATIVE PRIVATE PERSONS OR BUSINESSES

OEHHA is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

EFFECT ON SMALL BUSINESSES

OEHHA has determined that the proposed regulatory action will not impose any requirements on small business. Rather, the proposed regulatory action will assist small businesses subject to the Act in determining whether or not a discharge, release, or exposure for which they are responsible is detectable for purposes of the Act. The Act specifically excludes businesses with fewer than 10 employees from its requirements.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code Section 11346.5(a)(13), OEHHA must determine that no reasonable alternative considered by OEHHA, or that has otherwise been identified and brought to the attention of OEHHA would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action. As noted above, an alternative being considered by OEHHA is to repeal a portion of, or the entire regulation.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

OEHHA has prepared and has available for public review an Initial Statement of Reasons for the proposed regulations, all the critical information upon which the regulation is based, and the text of the proposed regulations. A copy of the Initial Statement of Reasons and a copy of the text of the proposed regulations are available upon request from OEHHA's Proposition 65 Implementation Program at the address and telephone number indicated above. These documents are also posted on OEHHA's Web site at www.oehha.ca.gov.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

The full text of any regulation which is changed or modified from the express terms of the proposed action will be made available at least 15 days prior to the date on which OEHHA adopts the resulting regulation. Notice of the comment period on the changed proposed regulations and the full text will be mailed to individuals who testified or submitted oral or written comments at the public hearing, whose comments were received by OEHHA during the public comment period, and who request notification from OEHHA of availability of such change. Copies of the notice and the changed regulation will also be available at the OEHHA's Web site at www.oehha.ca.gov.

FINAL STATEMENT OF REASONS

A copy of the Final Statement of Reasons may be obtained, when it becomes available, from OEHHA's Proposition 65 Implementation Program at the address and telephone number indicated above. The Final Statement of Reasons will also be available at the OEHHA's Web site at www.oehha.ca.gov.

OFFICE OF ENVIRONMENTAL
HEALTH HAZARD ASSESSMENT

VAL F. SIEBAL
Chief Deputy Director

Dated: June 4, 2004